NO. SC 85948

IN THE SUPREME COURT
FOR THE STATE OF MISSOURI

MICHAEL HANCOCK,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

POINT

THE TRIAL COURT ERRED IN FINDING SECTION 577.023 R.S.MO. CONSTITUTIONAL, BECAUSE SECTION 577.023 R.S.MO. OCCASIONS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS AS MANDATED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS APPLIED TO THE STATES AND ARTICLE I § 2 OF THE MISSOURI CONSTITUTION, IN THAT THE DEFINITION OF AN "INTOXICATION-RELATED TRAFFIC OFFENSE" STATUTORILY DISCRIMINATES AMONGST LIKE OFFENDERS RESULTING IN DISPARATE TREATMENT OF SIMILARLY SITUATED PERSONS WITHOUT THE SHOWING OF A RATIONAL STATE INTEREST CREATING INVIDIOUS DISCRIMINATION THROUGH THE APPLICATION OF THE PRIOR AND PERSISTENT OFFENDER ENHANCEMENTS.

TABLE OF AUTHORITIES

Page No.

CASES

TABLE OF AUTHORITIES

Page No.

CASES

TABLE OF AUTHORITIES

Page No.

CASES

STATUTES

CONSTITUTIONAL CITATIONS

JURISDICTIONAL STATEMENT

Defendant Michael Hancock was arrested for driving while intoxicated in violation of Section 577.010 RSMo. In a court-tried case, he was found guilty and sentenced as Persistent Alcohol Offender pursuant to the provisions of Section 577.023 RSMo.

In the trial court proceeding, Defendant averred that Section 577.023 RSMo. violated the Fourteenth Amendment to the Constitution of the United States as applied to the states and Article I , Section 2 of the Constitution of the State of Missouri. Specifically, Defendant argued that provisions of Section 577.023 RSMo violated the equal protection clause of both the federal and state constitution in that this statutory section invidiously discriminated between like offenders by punishing those whose predicate alcohol related traffic offenses were adjudicated before nonlawyer judges differently from those whose predicate alcohol related traffic offenses were adjudicated before lawyer judges. Although Defendant's recidivist conduct equated with one pleading guilty to or being found guilty of the same predicate offenses before a nonlawyer judge, Defendant was treated dissimilarly on the occurrence of a third time-qualified offense.

The trial court rejected Defendant's argument; hence, this appeal.

> The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed

> is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.
>
> Article V, Section 3 MO. CONST. (1945).

As this case involves the validity of a statute of the State of Missouri, the Supreme Court has exclusive appellate jurisdiction.

STATEMENT OF FACTS

On October 10, 2002, Appellant Michael Hancock was charged by felony information with driving while intoxicated. It was alleged that July 15, 2001, in Green County, Missouri, he operated a motor vehicle while under the influence of alcohol. [L.F. 9].

For purposes of enhancement it was further alleged that on April 21, 1994 he had pleaded guilty to driving while intoxicated for events occurring on January 17, 1993 in Greene County, Missouri and, prior thereto, on April 13, 1994, he had pleaded guilty to driving while intoxicated for events occurring on June 23, 1992 in the Municipal Court of the City of Springfield, Missouri. As it would relate to the April 13, 1994 proceeding, it was averred that the judge was an attorney and Mr. Hancock was represented by counsel. [L. F. 9].

At trial, the State offered Exhibit 1, a certified copy of the court file for the January 17, 1993 incident. [Tr. 90]. This exhibit was admitted without objection. [Tr. 91]. The State next offered Exhibit 2, a certified and true copy of the original court records of the Springfield Municipal Court involving the June 23, 1992 arrest. Records contained within Exhibit 2 reflected that the judge was an attorney and that Mr. Hancock had been represented by counsel. [Tr. 91]. Trial counsel for Appellant Hancock objected to admission of Exhibit 2 on several grounds. As related to this appeal, trial counsel referred the court to his earlier pleading which had set forth his challenge to the constitutionality of Section 577.023. R.S.Mo. [Tr. 92]. Appellant's Notice and Suggestions in Support of his Challenge were filed with the trial court on October 2, 2003. [L.F. 12-23]. The trial judge overruled Appellant's objections to the admission of State's Exhibit 2. [Tr. 99].

At the conclusion of the presentation of evidence, the trial court took the matter under advisement. [Tr. 119]. On December 15, 2003, the trial court announced that it had found Appellant guilty of the Class D Felony of Driving While Intoxicated. [L.F. 25].

On February 23, 2004, the trial court sentenced Defendant to four years in the Missouri Department of Corrections. [L.F. 25]. The Court thereafter suspended the execution of that sentenced and placed Appellant on five years probation. [L.F. 25].

The sole issue presented in this appeal involves the Appellant's challenge to the constitutionality of Section 577.023 R.S. Mo., the Prior and Persistent Offender Statute.

POINT RELIED UPON

THE TRIAL COURT ERRED IN FINDING SECTION 577.023 R.S.MO. CONSTITUTIONAL, BECAUSE SECTION 577.023 R.S.MO. OCCASIONS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS AS MANDATED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS APPLIED TO THE STATES AND ARTICLE I § 2 OF THE MISSOURI CONSTITUTION, IN THAT THE DEFINITION OF AN "INTOXICATION-RELATED TRAFFIC OFFENSE" STATUTORILY DISCRIMINATES AMONGST LIKE OFFENDERS RESULTING IN DISPARATE TREATMENT OF SIMILARLY SITUATED PERSONS WITHOUT THE SHOWING OF A RATIONAL STATE INTEREST CREATING INVIDIOUS DISCRIMINATION THROUGH THE APPLICATION OF THE PRIOR AND PERSISTENT OFFENDER ENHANCEMENTS.

A.B. v. Frank, 657 S.W.2d 625 (Mo. Banc 1983)

Article I, Section 2, Constitution of the State of Missouri

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942)

State v. Baker, 524 S.W.2d 122 (Mo. 1975)

ARGUMENT

THE TRIAL COURT ERRED IN FINDING SECTION 577.023 R.S.MO. CONSTITUTIONAL, BECAUSE SECTION 577.023 R.S.MO. OCCASIONS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS AS MANDATED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS APPLIED TO THE STATES AND ARTICLE I § 2 OF THE MISSOURI CONSTITUTION, IN THAT THE DEFINITION OF AN "INTOXICATION-RELATED TRAFFIC OFFENSE" STATUTORILY DISCRIMINATES AMONGST LIKE OFFENDERS RESULTING IN DISPARATE TREATMENT OF SIMILARLY SITUATED PERSONS WITHOUT THE SHOWING OF A RATIONAL STATE INTEREST CREATING INVIDIOUS DISCRIMINATION THROUGH THE APPLICATION OF THE PRIOR AND PERSISTENT OFFENDER ENHANCEMENTS.

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State v. Baker, 524 S.W.2d 122 (Mo. 1975)

> To preserve a constitutional claim for appeal, "the claim must have been raised at the earliest opportunity and preserved at each step of the judicial process." *State v. Stottlemyre*, 35 S.W.3d 854, 861 (Mo. App. W.D. 2001) (*quoting State v. Sumowski*, 794 S.W.2d 643, 647 (Mo. banc 1990)). Specifically, a party must: (1) raise the constitutional issue at the first available opportunity; (2) specifically designate the constitutional provision claimed to have been violated

> by express reference to the article and section of the constitution or by quoting the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.

State v. Rogers, 95 S.W.3d 181, 185 (Mo. App. W.D. 2003) *citing State v. Knifong*, 53 S.W.3d 188, 192 (Mo. App. W.D. 2001).

Appellant timely tendered his Notice Challenging the Constitutionality of Section 577.023 by his pleading filed October 2, 2003. [L.F. 12-23]. Within his notice, Appellant apprised the trial court and counsel for the State that Section 577.023 violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as applied to the States and Article I Section 2 of the Constitution of the State of Missouri. In summary, Appellant alleged that Section 577.023 violated the Constitution in that it denied Appellant equal protection under the law in that although he committed the same offenses as another, he was being treated differently than one whose prior predicate offense was resolved before a nonlawyer judge. [L.F. 12-23]. Appellant has preserved this issue throughout this appeal.

In addressing challenges to the constitutionality of statutes, Appellant recognizes that there are several well-established standards. First, statutes are presumed to be constitutional, and this Court is to construe any doubts regarding a statute in favor of its constitutionality. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). In addition, statutes will be upheld unless they "clearly and undoubtedly" violate constitutional limitations. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). Finally, the party

raising the challenge bears the burden of demonstrating that the statute is unconstitutional. *McEuen v. Mo. State Bd. of Educ.*, 120 S.W.3d 207, 209 (Mo., 2003) *citing C.C. Dillon Co. v. City of Eureka,* 12 S.W.3d 322, 327 (Mo. banc 2000).

Where a statute neither affects a "fundamental right" nor involves a "suspect class" in need of special protection, it will be struck down on the basis that it constitutes a denial of equal protection of the law only if it is not rationally related to some legitimate state interest. *Labor's Educational and Political Club-Independent v. Danforth*, 561 S.W.2d 339, 347 (Mo. banc 1978). "(T)he question is whether the principle of classification adopted rests upon some real difference, bearing a reasonable and just relation to the act with respect to which the classification is proposed." *State v. Ewing*, 518 S.W.2d 643, 646 (Mo. 1975). "The burden is on the person attacking the classification to show that it does not rest upon any reasonable basis, and is purely arbitrary." *State v. Davis,* 765 S.W.2d 603, 606 (Mo. 1989).

Appellant was charged with the Class D Felony of Driving While Intoxicated. [L.F. 9]. It was alleged that Appellant was a Persistent Offender.

The State of Missouri, in § 577.023.1.(2)(a) R.S.Mo., defines a "persistent offender" as one who has pleaded guilty to or been found guilty of two or more "intoxication-related traffic offenses" within ten years of the present intoxication-related traffic offense. A "prior offender" is one who has pleaded guilty to or been found guilty of one "intoxication-related traffic offense" within five years of the present intoxication-related traffic offense. §577.023.1.(3) RSMo.

An "intoxication-related traffic offense" is statutorily defined and includes driving while intoxicated, driving with an excessive blood alcohol concentration, ... or "driving under the influence of alcohol or drugs in violation of a county or municipal ordinance, *where the judge in such case was an attorney*..." § 577.023.1.(1) RSMo. (emphasis added). Hence, to plead guilty to or be found guilty of an "intoxication-related traffic offense" involving a municipal ordinance violation, the judge presiding over the proceeding must be an attorney. If the municipal judge is not an attorney, the proceeding is not one which can constitute an "intoxication-related traffic offense". Thus any plea of guilty or finding of guilt before such an individual cannot not provide a statutory predicate for enhancement as an intoxication-related traffic offense.

Appellant respectfully suggests that § 577.023.1.(1) RSMo as written occasions a denial of the equal protection of the laws as mandated by the Fourteenth Amendment to the Constitution of the United States as applied to the States and Article I, Section 2 of the Missouri Constitution in that the definition of an "intoxicated related traffic offense statutorily discriminates against like offenders resulting in disparate treatment of similarly situated persons without the showing of a rational state interest.

"Clearly, the purpose of this Prior/Persistent Offender statute [§ 577.023] is to deter persons who have previously been convicted of driving while intoxicated from repeating their unlawful acts and to severely punish those who ignore the deterrent message. *State v. Gibson*, 122 S.W.3d 121, 128-129 (Mo. App. W.D. 2003) quoting *A.B. v. Frank*, 657 S.W.2d 625, 628 (Mo. Banc 1983) (emphasis added). That being said, the statute fails in its purpose in that it does not permit enhancement where a prior predicate offense was resolved in a municipal proceeding presided over by a nonlawyer judge.

Individuals pleading guilty before or being found guilty by non-lawyer judges can *never* have any subsequent offense subject to enhancement by reason of this prior disposition. This exclusion irrationally excludes an entire class of intoxication-related traffic offenders who, although committing the same offense as one appearing before a lawyer judge, escape the sanction of enhancement upon the occurrence of a subsequent offense.

The elements of the offense, whether the offense be committed within a municipality served by lawyer or a nonlawyer judge, are the same. The range of punishment for the offense, whether it be committed within a municipality served by lawyer or a nonlawyer judge, is dictated not by the status of the judge but, rather by the legislative body of the community through its ordinances as limited by the general assembly. The rules of evidence and the burden of proof, whether the proceeding be had before a lawyer judge or a nonlawyer judge, are the same. Both individuals have engaged in the same prohibited conduct. However, only the individual who has appeared before a lawyer judge in a predicate municipal proceeding may be more harshly sanctioned upon a repeat occurrence.

A "recidivist statute like § 577.023 defines a 'penalty rather than a crime.' *State v. Cullen,* 39 S.W.3d 899, 904 (Mo. App. E.D. 2001) . . . . (P)roof of such prior convictions merely serves to authorize enhanced punishment for the underlying offense charged, if the defendant is found guilty. *State v. Gibson,* 122 S.W.3d 121, 131 (Mo. App. W.D. 2003) citing *State v. Cullen,* 39 S.W.3d 899, 904 (Mo. App. E.D. 2001). The statute thus focuses upon prior *conduct* as a premise to enhance.

"Legislation is irrational if it creates a classification wholly irrelevant to achieving its objective." *United States v. Hawkins*, 811 F.2d 210, 216 (3d Cir. 1987). If the objective is to severely punish the recidivist, it fails by excluding an entire community of offenders from the possibility of an enhanced sanction. It thus treats similarly situated individuals distinctly different.

> The Equal Protection Clause of the Fourteenth Amendment commands that all persons similarly situated be treated in like manner. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); *Cooper v. Missouri Bd. of Probation and Parole*, 866 S.W.2d 135, 137 (Mo. banc 1993), *cert. denied*, 129 L. Ed. 2d 843, 114 S. Ct. 2718 (1994). It does not forbid the state the power to make classifications, as long as its classifications do not establish invidious discrimination or attack a fundamental interest. *Parton v. Atkins***,** 641 S.W.2d 129, 131 (Mo. App. 1982). When a statute neither impinges the rights of a suspect classification nor impinges on a fundamental right, it should not be deemed to violative of the equal protection clause unless the statute's classification is totally arbitrary or lacks any legitimate rationality**.** *Cleburne*, 473 U.S. at 440.

Kennedy v. Missouri Attorney General, 922 S.W.2d 68, 70, 1996 Mo. App. LEXIS 854 (Mo. App. W.D. 1996).

The purpose of the equal protection clause is to insure that similarly situated individuals will be dealt in a like manner by the government. When a statute creates a suspect classification or impinges upon a fundamental right or the statute's classification is totally arbitrary or lacks any legitimate rationality the statute violates the equal protection clause.

State v. May Department Stores Company, 835 S.W.2d 318 (Mo. banc 1992) citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). *Carter v. Director of Revenue*, 805 S.W.2d 154, *cert. denied,* 502 U.S. 821, 112 S.Ct. 81, 116 L.Ed.2d 54 (1991). In the context of the Prior and Persistent Alcohol Offender statute, it would be rational to believe that all time qualified recidivists would be subjected to equivalent enhancement sanctions. However, the statute as written accords distinct and unequaled punishment by effectively ignoring the criminal history of one whose fortuitous circumstances derive from a nonlawyer judge proceeding.

Michael Hancock was charged by information as a Persistent Alcohol Offender, a Class D Felony. [L.F. pg. 9]. Consequently the state was required to prove, in addition to the allegations of the present offense, that Hancock twice before had either plead guilty to or was found guilty of an "intoxicated related traffic offense". Those predicate enhancements had to have been exclusive of any plea or finding before a nonlawyer judge.

Although the equal protection clause does not deny states the power to treat different classes of persons differently, "it does, however, deny to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Eisenstadt, Sheriff v. Baird*, 405 U.S. 438, 447; 92 S. Ct. 1029, 1035; 31 L. Ed. 2d 349, 359 (1972). A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced

shall be treated alike." *Eisenstadt, Sheriff v. Baird*, 405 U.S. 438, 447; 92 S. Ct. 1029, 1035; 31 L. Ed. 2d 349, 359 (1972). § 577.023 R.S.Mo. clearly fails in such endeavor.

Hancock acknowledges the general rule that sentence enhancement statutes withstand constitutional attacks when such an attack is focused on the punishment for a prior offense. "Such statutes do not punish a defendant for prior convictions; rather, they punish him as a repeat offender for his latest offense on the basis of a demonstrated propensity for misconduct." *State v. Zoellner*, 920 S.W.2d 132, 135 (Mo. App. E.D. 1996) citing S*tate v. Action*, 665 S.W.2d 618, 619 (Mo. banc 1984). Hancock does not attack § 577.023 on such basis. Rather, his challenge is predicated upon the *dissimilarity* of the sanction which arises *solely* by reason of the status of the individual who presided over his predicate offense proceeding. The inequality of treatment results by reason of his misfortune of appearing before a lawyer judge; had his predicate conduct been resolved before a nonlawyer judge the state could not pursue the felony enhancement.

An individual with prior pleas or findings before a non-lawyer judge demonstrates no less of a propensity for the same misconduct than an individual who commits the same offense but appears before a lawyer judge. In each situation the defendant drove a motor vehicle while under the influence or with an excessive alcohol concentration in his blood. Only the status of the judicial officer, an issue wholly unrelated to the behavioral characteristics of the defendant and the crime, dictates the enhancement possibilities. Such an irrationally based distinction renders § 577.023 unconstitutional as applied.

In *State v. Baker*, 524 S.W.2d 122 (Mo. 1975) the Missouri Supreme Court considered an equal protection challenge to the constitutionality of § 546.480 R.S.Mo. This legislation provided:

> When any person shall be convicted of two or more offenses, before sentence shall been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction.

According to the Supreme Court, the purpose of this statute was to insure that *some* multiple criminal offenders were punished more severely than others. *Id*. at 127. However, the Court observed, the statute did not apply to all convicted multiple offenders. "It applies if, but only if, a defendant is convicted of at least two offenses before he is sentenced for either offense. The question presented was whether such a classification was reasonable. Or, did it result in irrational inequality of treatment for multiple criminal offenders?" *Id*. at 127.

The Court found such unequal treatment irrational and thus unconstitutional. The distinction in treatment was *not* based on any legitimate state purpose or interest.

> It mandates different treatment of defendants without any reasonable or rationale basis for that difference. The increased punishment by means of mandatory consecutive sentences is not made applicable simply on the basis that a defendant has committed multiple offenses. It is not based on how many offenses a defendant has committed or how severe they are. It is not based on

> whether the offenses in question were all committed at the same time or whether they were committed at different times. It is based solely and only on whether the defendant was convicted of at least two offenses before he is sentenced on either of them.

Id. at 129.

The equal protection clause requires that distinctions in classifications for the purpose of sentencing have some relevance to the purpose for which the classification is made. *Id.* at 130. In the instant proceeding, as in *Baker*, there is no relevance to the distinctions in the classifications, thus rendering § 577.023.1 unconstitutional; in both situations, the distinctions are not even remotely consistent with the purpose of the legislation.

> [R]elevance cannot be found when applicability of the mandatory consecutive sentencing requirement for multiple offenders has no relationship to such things as seriousness of the offenses committed, the factual circumstances surrounding the offense, whether the offenses were committed at the same time or at different times or the previous criminal record of defendant, and is dependant solely on the chronological happenstance of whether there were two convictions before sentencing on either offense.

Id. at 130.

In finding § 546.480 unconstitutional, the Court considered the United States Supreme Court's holding in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942). *Skinner* involved a challenge to the constitutionality of an enhancement

statute on equal protection grounds. At issue was Oklahoma's Habitual Criminal Sterilization Act. That Act defined an "habitual criminal" as one, who having been convicted two or more times for crimes "amounting to felonies involving moral turpitude," is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. If found to be an habitual criminal, the act directed the State Attorney General to institute proceedings seeking to have such person rendered sexually sterile. The statute however, exempted from predicate sterilization offenses, those which arose out of violations the prohibitory laws, revenue laws, embezzlement, or political offenses. *Id.* at 536-537.

Petitioner challenged the Oklahoma statute as violative of the equal protection clause of the Fourteenth Amendment. The Supreme Court of the United States agreed. In its Opinion, the Court observed several inequities in the Act's application. By way of exemplification, the Court stated:

> In Oklahoma, grand larceny is a felony. *Okla. Stats. Ann.* Tit. 21, §§ 1705, 5. Larceny is grand larceny when the property taken exceeds $20 in value. *Id.* § 1704. Embezzlement is punishable 'in the manner prescribed for feloniously stealing property of the value of that embezzled.' *Id.* § 1462. Hence, he who embezzles property worth more than $20 is guilty of a felony. A clerk who appropriates over $20 from his employer's till (*id.* § 1456) and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his

> embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony (*id*. § 1719); and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. *Id*. § 1455. Hence, no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized.

Skinner v. Oklahoma, 316 U.S. 535, 86 L. Ed. 1655, 1658-1659, 62 S. Ct. 1110, 1942 U.S. LEXIS 493 (1942).

> The Oklahoma statute was found to run afoul of the equal protection clause.
>
> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. . . .
>
> In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.

Id. at 541-542.

Similarly artificial lines inhere in § 577.023 R.S.Mo. The predicate offenses for enhance are the same yet the enhancement ramifications are not; it is only the status of the judicial officer considering the predicate proceeding which differentiates the significance to be afforded upon the occurrence of a subsequent offense. .

A Maryland statute which treated juveniles differently simply based upon the location of their arrest was found to be unconstitutional in *Long v. Robinson*, 316 F.Supp. 22 (D. Md 1970). Under the enactment, sixteen and seventeen year olds arrested in Baltimore City were statutorily excluded from participation in the juvenile court system. Those same perpetrators who committed the same offense outside Baltimore City had their proceedings conducted within the juvenile court system. In finding the statute unconstitutional, the Court recognized that it was the location of arrest rather than the nature of the offense which was determinative. "The place of arrest, rather that the inherent or acquired characteristics of the offenders, is purely fortuitous, but determinative." *Long v. Robinson*, 316 F.Supp. 22, 27 (D.Md 1970). The effect upon a defendant is not "hypothetical but starkly real". *Long* at 28. As such, the statute failed to withstand equal protection scrutiny.

Just as fortuitous as the location of an arrest is the status of the individual who presides over a predicate intoxication-related traffic proceeding. Neither the location of the arrest nor the judicial officer of the governing body bear any rational relationship to the offense or the offender.

Hancock also recognizes the authority of the State to utilize both a lawyer and a nonlawyer judicial system. The U.S. Supreme Court found this structure constitutional in *Missouri v. Lewis*, 101 U.S. 22, 25 L.Ed. 989 (1879). There, the Court recognized that the such judicial systems were constitutional so long as "all person within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress." *Missouri v. Lewis*, 101 U.S. 22, 30; 25 L.Ed. 989, 992; (1879).

In *Lewis*, the Equal Protection Clause was defined to mean "(T)hat no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Id.* Hancock enjoys no similarity of treatment; his offender status is enhanced whereas others committing the same offense cannot be enhanced if their predicate judge was a lay individual.

The U.S. Supreme Court did uphold the constitutionality of classifying cities by population and permitting non-lawyer judges in *North v. Russell*, 427 U.S. 328; 96 S.Ct. 2709; 49 L.Ed. 2d 534 (1976). There, the defendant, Lonnie North, appealed his DWI conviction. His proceeding was had before a non-lawyer judge. He challenged the constitutionality of a system which permitted a non-lawyer judge to preside over his matter when an individual similarly charged but residing in a larger city would be tried before a lawyer. In upholding the Kentucky statute at issue, the Supreme Court noted that a defendant originally tried before a nonlawyer judge, was afforded the right to a trial de novo before a lawyer judge. Since North declined to capitalize on this opportunity, he could not now complain. "In all instances, a defendant in Kentucky facing a criminal sentence is afforded an opportunity to be tried *de*

novo in a court presided over by a lawyer-judge since an appeal automatically vacates the conviction in police court" *North v. Russell*, 427 U.S. 328, 334; 96 S.Ct. 2709, 2712; 49 L.Ed. 2d 534, 334 (1976).

The *North* situation is distinctly different from the issues complained of herein. *North* considered review opportunities afforded those originally appearing before and now complaining of a lay judge proceeding. It did not involve the discriminatory treatment which is occasioned solely by reason of the status of the predicate judge. In essence § 577.023 R.S.Mo. discourages a trial de novo from a lay judge proceeding for the lay judge's acceptance of a defendant's plea of guilty or his finding of guilt may not provide the predicate basis for any subsequent enhancement.

In conclusion, § 577.023 as written and applied violates the Equal Protection Clause. The stated purpose of the statute is to enhance the punishment of repeat offenders. Exempting from enhancement those individuals who fortuitously appeared before a non-lawyer judge results in the disparate and invidious treatment of those offenders who appeared before a lawyer judge for an identical violation. No rational basis exists for the legislature to exempt identical offenders from identical treatment.

The purpose of the Prior/Persistent offender statute is to ensure repeat offenders receive an increased penalty for each repeat offense. As written, the statute operates in contravention to that purpose.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendant prays this Court inquire as to the Constitutionality of § 577.023, and upon consideration thereof, find the same to be in violation of the Equal Protection Clause of Fourteenth Amendment to the Constitution of the United States as applied to the states and Article I §2 of the Constitution of the State of Missouri.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03 and (b) complies with the limitations contained in Supreme court Rule 84.06(b) and contains 5597 words, excluding the cover, the signature block and this certification, as determined by WordPerfect 9.0 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on this ____ day of August, 2004, to:

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_____
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APPENDIX
TABLE OF CONTENTS